UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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M.D. DANIEL CAMERON,

Plaintiff,

v. 17 Civ. 3420 (JGK)

M.D. HOWARD ZUCKER, et al.,

Defendants.

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New York, N.Y.
May 16, 2017
5:15 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

JACQUES G. SIMON
Attorney for Plaintiff

NEW YORK STATE OFFICE OF ATTORNEY GENERAL
Attorneys for Defendants
BY: MATTHEW LAWSON
MARYANN JAZINI DORCHEH

NEW YORK STATE DEPARTMENT OF HEALTH
Attorneys for Defendants
BY: HENRY WEINTRAUB
ROY NEMERSON

(Case called)

MR. SIMON: Jacques Simon. I represent the plaintiff.

THE DEFENDANT: Matthew Lawson from the State Attorney General office. And with the court's indulgence, also at counsel table with me today are my colleague, MaryAnn Dorcheh, and two lawyers from the State Department of Health, Mr. Roy Nemerson and Mr. Henry Weintraub.

Good afternoon, your Honor.

THE COURT: Good afternoon.

This is an application for a preliminary injunction, which includes a request for a TRO. Now, I'm perfectly happy to listen to the parties. It's plain that I should give you a schedule for the preliminary injunction, when the papers in opposition will be submitted, when the reply papers will be submitted. Then there's the issue of the temporary restraining order.

The plaintiff is attempting to stop a hearing with respect to the defendant's practice, which is scheduled to occur on June 12, almost a month away. There are various possibilities. I'll certainly listen to the parties, but it seems plain to me a temporary restraining order is only good for 14 days, and though it can be renewed for another 14 days, a temporary restraining order doesn't do anything with respect to a hearing which is scheduled on June 12. There is no showing that I should grant a temporary restraining order

putting off a hearing which is not yet scheduled to occur within the 14 days.

Then the question really becomes how quickly the parties could brief the preliminary injunction and are the parties, are the defendants committed to a June 12 date for the hearing. Is it such that I have to decide the preliminary injunction before June 12. Sometimes parties are prepared to put things over to give themselves a little more time to brief, but those are some of my preliminary observations based on the papers.

I'm happy to listen first to the plaintiff and then to the defendant.

MR. SIMON: Thank you, your Honor.

Yes. My name is Jacques Simon. I represent the plaintiff. Thank you for giving me an opportunity.

The reason why I came here with the TRO, same concerns as your Honor, usually when bad faith prosecution claims are concerned, there is a briefing schedule. There may be, also, there's a couple of districts that refer the cases out to the magistrate for factual hearings, because there's got to be a factual finding regarding whether or not there is, indeed, a bad faith prosecution, when the DJ gets involved or approves or denies what the magistrate finds out on top of the briefings.

Right now the briefings put forward, the briefings, this is a two-tiered case, Judge. One part has to do with bad

faith prosecution, the other has to do with antitrust. And that's why I asked permission, I put in substantial memoranda of law and asked permission to exceed the page limitation, because the two issues are substantial.

THE COURT: I know. Your memo was twice as long.

MR. SIMON: I asked permission in my affidavit to exceed that because I am aware of the rule. But I asked the defendants, can we put off the hearing of the 12th to give us an opportunity to brief this and do this in an orderly fashion. They said no, and that's why I'm here on the TRO. Otherwise, I didn't want to come here with a TRO, you know, too close to the date, and then you would have asked why did you wait so long.

I'm aware of the rule that says it is good for 14 days. I was wondering, because I read the rule closely, there was no notice and there was notice, and this is one way we gave them notice to come here. And I'm not sure if the 14 days applies to notice or no notice. The rule was ambiguous to me. I'm here because pretty much I did everything that you said to do and I asked them can we put this off to brief. They said no, so I'm here.

THE COURT: It seems clear to me from what I said that you're looking for a stay of the hearing which is scheduled for June 12.

MR. SIMON: Correct.

THE COURT: A temporary restraining order just doesn't

do you any good because a temporary restraining order is only good for 14 days. So if I entered a TRO today, I would stay the hearing, but the hearing is only scheduled for June 12.

MR. SIMON: Right.

THE COURT: But what this means is, of course, that the defendants have to respond to the motion for a preliminary injunction and you have to reply and I have to decide.

You mentioned a magistrate judge. I mean, this is a matter that would usually be decided by the district court judge as to whether to give you a preliminary injunction or not.

Why don't you use this opportunity briefly to tell me why you think you're entitled to a preliminary injunction. I mean, obviously you're aware that under Younger, federal courts lack subject matter jurisdiction to interfere with or enjoin a state court administrative proceeding, which is a stayed administrative proceeding, which furthers a public interest. And plainly a doctor's certification or decertification proceeding is one of those administrative proceedings.

So the question is, are the defendants somehow operating in bad faith, is it really bad faith for the commissioning authorities to believe that one form of therapy for Lyme disease is acceptable and one is not. Those would, on their face, appear to be medical judgments.

But let me listen to you for the argument that you

want to make. And I will ask for a response from the defendants initially and an appropriate briefing schedule.

MR. SIMON: That would be great, Judge.

That would be a medical judgment, except that in 2015, the New York legislature stepped in, and precisely because of this, because they were in the Lyme disease arena. I don't know if you're familiar with that. Next door, Tony Blumenthal, ex state attorney general, said that you had a similar issue with the same group, the exact same group. Because of this, what happened, there are furious, furious legislators lobbying up in Albany. And in 2015, in a balanced way, they came up with Public Health Law 230-B, and pretty much said that if you treat Lyme disease by methodology, other than what's not generally accepted, the state shall not prosecute, period, the end. That's all it says. They went a step further. They said if you investigate this and it appears that this is the issue, you shall not investigate further.

Now, they didn't call the two counts by name, Judge, precisely because of the reason that they wanted to strike a balanced language. But really, this statute in 2015 pretty much took doctors like Dr. Cameron, and Dr. Cameron is the one who initially authored the 2014 guidelines. He set the forefront of that last group. Pretty much the New York legislature thought it was so important for patients of Lyme disease to receive these services, that they would protect --

just like in Massachusetts, just like in Connecticut -- that they would protect doctors, such as Dr. Cameron, against prosecution.

Now, of course, the next question is, but, Mr. Simon, how do you know that they're prosecuting him for providing Lyme disease services according to that? I do. I outlined it. That's why we laid out a thick set of papers for you. But we have to state facts when it states bad faith, says the law, and we did. So pretty much the statutory scheme in New York goes something like this.

In order to be able to prosecute somebody and to press charges, you need to get the OK from a committee of the Board of Professional Medical Conduct to go ahead with the prosecution. They investigated Dr. Cameron back in 2008, and they started 2002. That's not part of this. They picked up again in 2008 --

THE COURT: By the way, there is a criminal matter that's on and we are waiting for the government attorney.

MR. SIMON: Should I leave?

THE COURT: If all of the lawyers for the criminal matter arrive, I always take criminal matters in preference to any civil matter. I just give you fair warning that we may have to interrupt this.

MR. SIMON: That's OK. Sorry.

THE COURT: Go ahead.

MR. SIMON: I understand.

The reason why, back to how it is that we know that this is bad faith, Judge. Back in 2010, their own letter, they have to notify Dr. Cameron what it is that they are investigating and to give him an opportunity to come to an interview to dispel it. The only thing that they notified him of at that time is the matter in which you treated and diagnosed Lyme disease, including these patients which are now -- the list is down, but they are not part of this.

He went to the interview. The only issues that were the subject matter of the interview was his practice by the guidelines. But not only there, but they had an interviewer that infused his own what should be, what shouldn't be in favor of the guidelines. Those are the only issues that could have been presented to the committee to OK for prosecution. Nothing else.

Now, when you go and look at the statement of charges, there's no mention of Lyme. There is no mention of the issues that are discussed in the interview. There is no mention of anything. So what happened, we tell you, your Honor, is the passage of the law came in between the interview and the filing of the charges. So now, in order to avoid the passage of the new language of the new law, they fashioned the statement of charges in such a fashion as to bypass whether they are authorized to prosecute.

Now, the law in New York is quite clear. They cannot file these charges without running it again by the committee and get an OK by the committee. We submit to your Honor that the only thing they are prosecuting my client for is practicing medicine by these guidelines.

THE COURT: If you're right, why would you not be able to raise that argument on appeal or in an Article 78 in the state court if, in fact, any disciplinary action were taken against your client for attempting to treat Lyme disease by what you think the practice is that the state is trying to discourage?

MR. SIMON: The answer is multifold. I'll start with the bad faith prosecution first.

The law is clear, bad faith prosecution is a constitutional wrong that the courts enjoin, number one. Number two, the statutory scheme is as such that these issues cannot be raised in the administrative forum for the courts of the State of New York to subsequently consider. Number three, I believe -- and I should have pulled that case up, because I ran into it -- that the case says that the availability of state remedies or the state disciplinary process is not adequate to vindicate bad faith prosecution. Bad faith prosecution should not take place, period, the end, and the federal courts will enjoin that.

THE COURT: OK. Anything else?

MR. SIMON: On the bad faith, that's it.

Then I have a lot on antitrust, but really, if you don't find bad faith, you're going to kick me out. I think that I briefed it quite methodically, that the first thing first, the court has to address the bad faith argument and if there is bad faith or not, because if there is no bad faith, there is no jurisdiction, end of it. If you find that there is bad faith, then there will be some for your Honor to entertain.

THE COURT: Thank you. That's very forthcoming.

I have a criminal proceeding which takes precedence. I'll do that. I don't think the criminal proceeding should take that long, then we'll resume.

(Recess)

THE DEPUTY CLERK: Continuation of Cameron v. Zucker.

THE COURT: I think I was up to the defendants at this point.

MR. LAWSON: Thank you, your Honor.

First, I would like to take this back to the fundamental requirements that are necessary for any TRO or any preliminary injunction. They are the same standard the courts have recognized. I would assert that none of those requirements have been met here.

Number one, the plaintiff has to show he is likely to succeed on the merits. The plaintiff has not shown that and cannot show it.

Number two, the plaintiff is likely to suffer irreparable harm in the absence of the injunctive relief. It has not shown it and cannot.

And two very important and often overlooked requirements that would be also dispositive standing alone here, number three, the balance of equities tips in the plaintiff's favor.

And, number four, the plaintiff has to show that an injunction is in the public interest.

I want to start with irreparable harm. As the Second Circuit has recognized, irreparable harm is the single most important prerequisite to the issuance of a preliminary injunction. And in the absence of the showing of irreparable harm, the preliminary injunction, or a TRO -- again, they're the same standard -- should be denied on that factor alone.

Irreparable harm, again, is an injury that is not remote, is not speculative, but it is actual and imminent for which monetary work cannot be adequately compensated.

The first question is, where is the imminent irreparable harm that requires an immediate TRO today? He is not complaining about any harm that is happening today or tomorrow or next week or the week after that. He is concerned about the possible result of an administrative hearing that doesn't even begin until the 12th of June. That is not imminent harm, but also not actual harm.

The plaintiff's position here, which the state strongly disagrees with, is that the charges of misconduct and incompetence and gross negligence, among others that have been levied against this particular physician, the plaintiff is claiming those are a sham, and he is claiming that he's actually innocent of these charges. Well, if that is true, then the plaintiff has every right to go to this administrative hearing that is to be convened on the 12th and seek exoneration from the New York State Board for Professional Medical Misconduct. If he does that, then how is the harm here actual rather than remote or speculative?

It is not. Of course, that is not even the end of the road. He could file an Article 78 proceeding if he's unhappy with the result reached. The plaintiff in his papers, he doesn't really address the irreparable harm point substantively. He merely says he doesn't have to. He has invoked the words "bad faith" as if this is some sort of mantra. The mere indication means he automatically gets a TRO, but that's not the way it works.

The TRO is an extraordinary remedy and it requires an extraordinary showing, which is the plaintiff hasn't even approximated here.

THE COURT: Let me just refocus you just slightly. It is plain for the reasons that I already told the plaintiff, and the plaintiff seems to agree, there is no way that I could

invoke, could or would issue a TRO. It makes no sense.

The TRO which is being sought, which is to stay the state court administrative proceeding, which will not occur in the next 14 days. So if I issue a TRO, nothing happens over the next 14 days, and I haven't done anything to put over a hearing which is going to occur on June 12.

So the real issue is you're previewing your arguments with respect to the preliminary injunction, as to which the standards are the same, except TRO, perhaps, is slightly stronger, and the TRO directs us to whether relief should be granted for that period of time for which the TRO would otherwise be in existence.

Preliminary injunction plainly could put over the June 12 hearing, and the question then becomes whether, with respect to irreparable harm, the conduct of the hearing itself is irreparable harm if the plaintiff has a fair argument that he is being prosecuted in bad faith.

MR. LAWSON: If I could address that, your Honor?

THE COURT: That would be the question, right?

MR. LAWSON: If I could address that, your Honor?

The plaintiff has not made a case that that's the case. The cases that I've seen -- and I just got these papers yesterday, so I just got this 53-page brief yesterday myself --

THE COURT: That's all right. I only got them today.

MR. LAWSON: -- I looked at the cases that the

plaintiff has cited for the notion specifically that a bad faith prosecution can constitute irreparable harm without a further showing, and it appeared that they all arose from a criminal prosecution. His lead case was Wilson v. Thompson, Fifth Circuit, 1979. That was an appeal --

THE COURT: Could you hold off one second? I have to sign an order in a criminal case.

(Pause)

MR. LAWSON: The lead case that he cited specifically for the proposition that bad faith prosecution means irreparable harm, and that is the population I'm focusing on. I know he cited some bad faith cases in other contexts, but for the key and independently important issue of whether bad faith can constitute irreparable harm, the case was Wilson v. Thompson. It was a 1979 Fifth Circuit case. It was an appeal from a permanent injunction to stop a bad faith criminal prosecution that the Orleans District Attorney was bringing for perjury. Before the injunction was entered, there was actually a formal judicial finding that the prosecution was, in fact, in bad faith. Much different facts here.

This is not a permanent injunction where the parties have had a full and fair opportunity to litigate the issue. This is not a criminal prosecution. There has been no judicial finding of bad faith, and there are no facts in the record and none that have been submitted today that can support such a

finding.

Mr. Simon said that there was this letter from the Department of Health that somehow shows that they're not really concerned about poor care. They really have some animus or some vendetta against this particular unique Lyme disease treatment modality. It doesn't say that. In fact, if I'm looking at the same letter -- and, again, I just got this yesterday -- I believe he was referring to an August 17, 2010 letter. And yes, Mr. Simon was correct that the letter --

THE COURT: One moment. I'm sorry. One moment. I'm just signing a criminal order, an order in a criminal case.

(Pause)

THE COURT: Go ahead. Thank you. I'm sorry.

MR. LAWSON: It does mention that the patients that are at issue in this investigation were, in fact, being treated for Lyme disease, but that doesn't reveal any animus against the modality. He claims that it somehow does massively different from the statement of charges, but I'm not seeing that. There is a discussion about a differential, a failure to appropriately conduct differential diagnosis in both. So there is no evidence and there will be no evidence that there was somehow a vendetta against a particular technique.

The charges that were brought here and the charges that will be heard beginning on June 12 relate to incompetence, gross incompetence, negligence, such things as prescribing the

wrong medications, including narcotics in at least one instance without appropriate indications, failing to conduct a differential diagnosis, failing to review prior records, failing to follow up, failing to maintain proper records. These are the types of charges that can be brought against a doctor regardless of what type of specific unique modality or technique he uses. There is no evidence of that and there will be no evidence.

(Continued on next page)

THE COURT: Is the plaintiff correct that the defendants don't accept the type of treatment for Lyme disease that the plaintiff practices?

MR. LAWSON: I don't think that's correct, your Honor. My colleagues will correct me if they have anything to supplement. But I understand that there is a statute that contains certain recognition of this treatment method.

THE COURT: As I read the statute, the statute doesn't specify a specific method. What the statute says is, you can't use a method that's not generally accepted. So if you use a method that's not generally accepted, then, yes, you can be accused of malpractice. So then the question is left to the medical profession about what's generally accepted or not.

One of your colleagues wants to say something on this.

MR. NEMERSON: The statute asserts that which is already in practice, which is the mere fact that a physician engaging in a non-universally accepted modality is not in and of itself misconduct. That was the charge, misconduct. You can practice according to this school of thought, according to these definitions, and if it's done prudently, the department takes no objection to that. If you practice absolutely right-down-the-middle classic medicine and do it negligently, the department prosecutes it.

So that statute does not say what Mr. Simon says it says. We would not and did not bring a case or charges

alleging that the doctor did wrong by using this set of standards or using this modality of treatment. We are charging, and expect to prove, that in pursuing his own theory of treatment, which is OK, he failed to adequately evaluate the patient at the outset for her conditions. And in choosing a treatment modality that he favors and we don't object to, he failed to follow that modality truly. He did not monitor for side effects. When side effects were found he did not address them appropriately. The fact that these patients were diagnosed with Lyme disease and that this physician enlists with perhaps a minority school is actually irrelevant to our case.

THE COURT: OK. And what would the normal course be? The hearing is scheduled for June the 12th. So there will be a hearing on June the 12th, unless I issue a preliminary injunction. And is it usually a one-day hearing, or is it extended over time? Is there an opportunity for further submission?

MR. NEMERSON: Judge, a hearing such as this -- I think there were maybe seven patients charged -- would typically take at least four days for the department to present its case, an unknown number for the resident in our proceeding to respond. There are lots of exchanges of papers.

What would not be clear to anybody outside the department is, because our hearing committees consist of

citizens who are still in full-time practice, we don't do back-to-back day hearings. We don't even do week-to-week hearings. Typically there are three weeks between hearing days. So this case will be in hearing, with evidence being taken, months into the future. There are then post-hearing submissions. And then the committee deliberates. That can take a month or two or three.

Following that, there is a right to an administrative appeal, with about a 45-day turnaround for submissions, and then months of decision, and after that the Article 78.

THE COURT: And I take it that whatever decision the board makes would indicate what the basis for the decision was. So if the basis for the decision was the decision by the doctor to use a particular technique or theory of practice to treat Lyme disease, that would be in the decision. If, on the other hand, the decision were based on, as you say, the failure to accurately diagnose or treat, in whatever modality the doctor was following, that would also be in the decision. Right?

MR. NEMERSON: Yes, sir.

THE COURT: OK.

Thank you very much. That's very helpful to me in my thinking.

So if the state wants to continue? Yes? We were up to irreparable harm. Right?

MR. LAWSON: Certainly. Thank you, your Honor. And

of course above and beyond irreparable harm. There is a recent Supreme Court case, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 72008. It's a Justice Roberts opinion, I believe. And it's very interesting, because it stands for the proposition that even if the plaintiff can show actual and irreparable harm, or a likelihood of incurring that irreparable harm, and even if the question of success on the merits is at least a close call, where it could be that there's evidence one way versus the other, that the bottom factors, and that is the last two factors, the balance in equities and the public interest, can be dispositive and require denial of a preliminary injunction standing alone. And this is a case where the balance of the equities and the significant concerns about public interest profoundly weigh in favor of denial of the TRO, but also in favor of any preliminary injunction.

This is a case where a physician is charged with incompetence in connection with the treatment of patients. And not only that, this proceeding has gone on for years. I understand that this same doctor first tried to pursue his remedies and block any type of proceeding of this administrative nature in state court. And I understand he did that at least five years ago. And I also understand that that case was unsuccessful. So this is yet another bite at the apple.

Meanwhile, the public continues to suffer the harm,

because this is a physician that's charged with incompetence, negligence in treating patients. And while roadblocks continue to be thrown up against starting, finally, this administrative proceeding, the harm continues to be suffered and the public interest continues to receive the short end of the stick.

So I would say, your Honor, that those two factors, which can be decisive standing alone, weigh heavily in favor of denying the TRO and denying the eventual preliminary injunction. And that's going to be equally true in the future as it is now if not more so.

And the final factor to discuss here is of course a likelihood of success on the merits. And your Honor correctly recognized that the *Younger v. Harris* doctrine requires extension here. In fact, the only exception that the plaintiff has invoked the *Younger* extension in his memorandum of law was, once again, the talisman of bad faith, that -- and, again, that theory completely falls on the complete lack of any substantive evidence that there's any bad faith here.

There is no antitrust claim here, your Honor. He is alleging what appears to be both a Section 2 monopolization claim and a Section 1 claim, which I guess would implicate some alleged contract, combination, or conspiracy. But the problem, as I'm reading this complaint, it appears that the plaintiff is claiming that he's treating different patients than his own subgroup of patients. It's almost as if he's alleging that

he's not even competing in the same market that's allegedly being restrained. And also of course there is the problem that the Sherman Act is designed to protect competition as a whole in the relevant market, not the individual competitors within that market. And that's the *Tops* case in the Second Circuit from 1998.

But try as he may, what this complaint alleges is harm to a single competitor. He tries, desperately is trying here to convert this into some type of animus or some type of vendetta against the technique itself. But it's just conclusory allegations. He hasn't, to my knowledge, I haven't seen any identification of any other practitioner of this technique, or any other competitor that could be harmed, other than the plaintiff himself.

So that's the final factor. But the likelihood of success on the merits is a non-issue here, also weighs heavily and independently against granting any injunctive relief at any stage in this proceeding.

THE COURT: All right.

MR. LAWSON: It would seem that if the plaintiff were correct about this type of assertion, that there could never be any peer review in connection with an allegation of professional misconduct, because peer review involves your peers, involves your apparent competitors. And so it's hard to imagine how that allegation even makes any sense.

MR. SIMON: Do I have any reply time?

THE COURT: I'm sorry?

MR. SIMON: Any reply time?

THE COURT: Sure. Thank you.

MR. SIMON: We're getting off the track, Judge. There is -- it is not true that bad-faith prosecution only applies to criminal cases. In fact, my leading case is *Bassham v. State Bar of Texas*. And when you're getting into the hearings and what it is that should and should not go on, that case is instructive. The Fifth Circuit is very instructive as to what should and should not happen. They particularly cited the case and they said, the right is to be free of bad-faith charges and proceedings, not to endure them until their speciousness is eventually recognized. That is the irreparable harm that the courts, including the Northern District here, have recognized.

Unfortunately the Fifth Circuit developed that more than the Second Circuit. In the Second Circuit you have to be specific in what you're saying, and there's got to be subjective motivation, Judge. But really when we're getting into what process is due to the plaintiff in the face of a bad-faith prosecution, which, we allege that is happening, and it is, then he should not be forced to endure any hearing at all, according to this case. That's what the Fifth Circuit says.

And the other thing is, Judge, they're trying to say

that we're suing them for something else, or we're prosecuting for something else, other than the particular modalities that he's using. That is just not true.

And why is it not true, Judge? Because I included the report of the investigations in the exhibits, for you to see what it is that their motivation is. And time and again and again and again, Dr. Meyers keeps on putting into their report -- you have a question?

THE COURT: Well, one of the issues for me -- I understand your argument with respect to, if there is bad faith, you ought not to have to undergo a hearing. OK. Your argument for bad faith depends upon an argument that you're undergoing a disciplinary hearing for using a certain modality of treatment. The defendants deny that. They say that's not what the hearing is going to be about, it's going to be about how your client has practiced medicine.

Of course we'll know when the board comes out with its decision as to whether that's right or wrong. There would then be an administrative appeal and an Article 78. And we would know.

On the other hand, what you're asking me to do is to enjoin a state disciplinary proceeding for a doctor, the bottom line of which would be that when the state licensing authorities say, this doctor should be disciplined, in some way, with respect to the doctor's treatment of patients, you

want me as a federal court judge to say, "No, stop it, state, let him continue to practice," the downside of which would be, if the state were correct and the hearing proceeded and their final decision were made not on the issue of an incorrect modality but on the way in which the doctor was in fact practicing medicine, not only would you not have had a basis to stop the state, but the state would have stopped what could be a danger to the community.

MR. SIMON: But here is the answer to that analysis, Judge, because, in the context of New York law, the analysis, with due respect, is flawed. And why is it flawed? Because if indeed they are correct and they are now changing their mind and they are prosecuting him for something else, other than what they initially investigated and what was the subject matter of the investigation, they have to tell him what the subject matter of the investigation is, because that report of the investigation goes before the committee that acts like a de facto grand jury, that says you can go forward. If they change their mind, they've got to start from scratch and give him an opportunity to address those issues again.

THE COURT: Presumably.

MR. SIMON: Yes.

THE COURT: No, hold on. You don't know what's being presumed. Presumably, that is an argument that could be made to the board.

MR. SIMON: No.

THE COURT: No?

MR. SIMON: No, I can't, because, again, that prosecution, what happened is, there is a regulation. The judge, there's a JHO in the administrative proceedings. The JHO was divested of powers to dismiss the charges. So instead of stopping the bad-faith prosecution, they are subjecting him to it. And that is exactly when the harm happens, and that is exactly what *Bassham* says it does and it should not.

THE COURT: Is it true that you tried to block a disciplinary proceeding in the state court, or your client did, and that that was rejected by the state court?

MR. SIMON: No. Actually, yes, it's true, but not -- what happened, again, Judge -- and I disclosed that in the complaint, I did not hide it, by the way. It's up front. There were state proceedings. It had nothing to do with a new law. While that was happening, the new law passed. If the new law wasn't here, I wouldn't be here telling you that it's getting prosecuted against the new law prohibiting what it is that they're doing. The new law, in between that state prosecution and now, there was a new statute enacted. That's why I'm here.

THE COURT: Well, were the proceedings begun before the state statute? Have these proceedings been going on?

MR. SIMON: Yes. The proceedings were just done

following this year. Yes, they have been going on.

THE COURT: For five years?

MR. SIMON: They have been going on, yes -- I think they started in 2012. So, yes, the Court of Appeals, I think it was this year. The judge down here said quite a bit on the decision.

But those issues, Judge, had nothing to do with what's before your Honor right now because the new law wasn't there.

THE COURT: No, OK. But if the proceedings were brought before the new law and had just been continuing, it's sort of hard to make the argument that the board has been proceeding in bad faith. They started these proceedings over five years ago. They were attempted to be enjoined, unsuccessfully, in the state court. And now you say they're being continued in bad faith.

MR. SIMON: In violation of the new statute.

THE COURT: Yes. I know.

MR. SIMON: That intervened, which I didn't have.

THE COURT: I know that's the argument. But it doesn't seem quite right, when the proceedings were brought before the statute.

MR. SIMON: There were no proceedings, Judge. There was an investigation. There were no charges filed.

THE COURT: OK.

MR. SIMON: OK. This is the first time. The formal

charges were just filed and served now. So really the proceedings, there was a threat that they were going to file them, but there was no formal filing. The formal filing just got done right now, in the end of April.

THE COURT: OK. Well, all of this is helpful to me. I thank you. It seems to me I have to set a date for a response. And I hope that, in the response, I will get an affidavit from someone with knowledge of the state proceedings and what the medical standards are and what the board is doing, because all of this is very helpful to me in understanding the case.

So the response should be due May the 23rd. The reply May 26. And I will hear you again on June the 7th at 4:30 p.m. Let me just fill out order to show cause --

MR. LAWSON: Your Honor, with the Court's indulgence, we were wondering if it would be possible to extend the briefing schedule on the preliminary injunction motion so that the opposition papers would be due sometime maybe at the end of June.

THE COURT: What would I do with the June 12th date? Ignore it?

MR. LAWSON: June 12th is only the first day of the hearing.

THE COURT: I can't do that. I mean, I can't do that responsibly. I have a plaintiff who comes in, and I've already

said, I'm not going to grant the TRO. But I have a plaintiff who looks for relief and he's got a date of June the 12th. And this is also not a case, frankly, where I would try to urge the defendants to put over the hearing so that I would have more time or you would have more time to decide it, or you submit papers and I decide it. I wouldn't do it, because there is an argument of the public interest. And I'm not going to say that, when the state comes in and says, we're trying to take disciplinary action against a doctor who we believe shouldn't be practicing or should be disciplined or whatever the discipline is going to be, however long it may take in the state court, I shouldn't just ignore it and say, oh, look, to give the lawyers some more time, why don't you just let, you know, let the doctor continue to practice. We think he is negligently practicing. But, oh, let it go on for a while because the lawyers want more time to brief it and because your Honor may need some more time to decide the preliminary injunction. That's just not responsible. And it's not reasonable for you to make the argument to me.

I will make every effort, even though I spend my days on a criminal trial, to get on top and make a decision, because I actually bought your argument about balance of the equities and the public interest. But balance of the equities and the public interest only go so far. It only goes so far, as far as I can hear, to the point where counsel may be inconvenienced by

the need to submit papers quickly. That's not weighing the public interest and the balance of the equities very much.

MR. LAWSON: Understood, your Honor.

MR. SIMON: June 4, your Honor?

THE COURT: I'm sorry?

MR. SIMON: You said June 4?

THE COURT: Yes.

MR. SIMON: 4:30 again?

THE COURT: Yes.

(Pause)

MR. SIMON: He says it's a Sunday?

THE COURT: I'm looking at the proposed order. Yes, first order in paragraph, you can submit the brief in excess of the pages. Ordered that, on the 16th day of May, the plaintiff's motion for a temporary restraining order brought by this order to show cause be and here is denied. Ordered that the defendants, their agents, etc., show cause, at a hearing on plaintiff's application for preliminary injunction in Courtroom 12B on the 7th day of June, 2017 at 4:30 in the afternoon, why an order should not be entered granting a preliminary injunction in the form and substance set forth in the accompanying verified complaint and the affidavit of Jacques G. Simon. Ordered that upon application the Court shall order further relief as applied for. I don't need that paragraph. Ordered that service of a copy of this order to show cause

together with all of the papers on which it is predicated be effectuated -- it's already been made. The defendants have copies of the papers, right?

MR. SIMON: Yes.

THE COURT: And you'll have a copy of this order to show cause if you just wait around in the courtroom. We'll make a copy for you.

Service of a copy of this order to show cause, together with all the papers upon which it is predicated as recited above, has been accomplished. Responsive papers must be submitted by May 23. Reply papers must be submitted by May 26.

MR. SIMON: Electronic?

THE COURT: I'm sorry?

MR. SIMON: All on ECF, right?

THE COURT: Yes. You can serve the defendants with ECF, and you can put the papers on ECF. But courtesy copies should be provided to the Court by hand or by fax if less than 25 pages. And my fax number is (212) 805-7912, I believe. Yes? Yes?

You can call chambers.

May 16. OK. I have signed the order to show cause. And we'll make a copy of this and give it to you. So if you wait around in the courtroom. And I look forward to reading the papers and hearing you at the hearing.

Thank you, all.

MR. SIMON: Thank you, your Honor.

MR. LAWSON: Thank you.

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